BEVERIDGE & DIAMOND PC

Nicholas W. van Aelstyn
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Direct: (415) 262-4008
Fax: (415) 262-4040
nvanaelstyn@bdlaw.com

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***Via E-Mail & U.S. Mail***

Michael Massey, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

**Re: Comments on the City & County of San Francisco's November 21, 2008 Yosemite Creek "Due Care" Submission to U.S. EPA**

Dear Mr. Massey:

This letter responds to the letter dated November 21, 2008 from Deputy City Attorney Elaine M. O'Neil to you ("City Letter") on behalf of the City & County of San Francisco (the "City") in which the City sets forth its argument that it is entitled to the third party defense to liability as a potentially responsible party ("PRP") under CERCLA for the contamination of the sediments in Yosemite Creek ("Yosemite Creek" or the "Site").[1] There is no question that untreated discharges from the City's sewers have contributed to the contamination of Yosemite Creek. Accordingly, the City's Public Utilities Commission (the "SFPUC"), as the owner and operator of the City's sewer system, is a PRP. The City thus seeks to establish that CERCLA's third-party defense shields it from liability. To qualify for the defense, the City must establish all of the required elements by a preponderance of the evidence. Based on the City's Letter, it has not met its burden.[2]

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[1] This letter incorporates by reference the two prior memoranda that we provided to EPA on behalf of the Yosemite Creek PRP Group, one dated June 26, 2008, entitled "Potential CERCLA Liability for Owners of Sewer Systems," the other dated November 4, 2008, entitled "Response to SFPUC's Anticipated 'Due Care' Argument" (the latter is referred to herein as the "Group Memo").

[2] The City's failure to do so cannot credibly be based on lack of sufficient time. While the City states that its November 21 letter is in response to EPA's letter dated November 7, 2008 letter ("EPA Letter"), and that it was compiled under "considerable time constraints," City Letter at 2, these assertions lack support. As noted in EPA's Letter, the City had been discussing its potential liability with EPA for "the past six months," and the City had agreed to submit its due care showing in September, a deadline that later was moved to October.

The City's letter provides a lengthy and informative regulatory history of national efforts to address the problem of combined sewer outfalls ("CSOs") and the City's efforts to upgrade its sewers in that context. Rather than demonstrate that the City has met the elements of the third party defense, the letter documents that the City knowingly failed to take reasonable actions to prevent *untreated* discharges of hazardous substances from its sewers into Yosemite Creek and the Bay from CSOs during even minor storm events.

Just a few days ago (more than a week after submitting its letter), the City made available some of its many internal documents cited in its letter.[3] These documents demonstrate that the City knew about the environmental problems of its industrial wastewater discharges since the 1950's, and for decades did little to prevent them. Indeed, for decades it did just the opposite. What the City's letter euphemistically refers to as a process in which, "[e]ventually, consensus was reached between the City, Regional Board, and EPA regarding the appropriate level of overflow controls," City Letter at 12, is in fact a record of decades of bureaucratic battling, during which the City affirmatively resisted efforts by the State and federal governments to stop its practice of dumping raw sewage into the Bay. Much of this history was discussed in the Group Memo, though many more details have come to light from the documents produced by the City last week. We discuss these in greater detail below, but a few bear mention at the outset:

- ***The City has long been aware that industrial sewage in its system contained all of the chemicals of concern ("COCs") at the Site, yet did little about it.*** When the City began to institute a program addressing industrial sewer discharges following the adoption of the federal Clean Water Act in 1972, it was concerned about all of the COCs, yet to this day lacks discharge limits for most of them.

- ***The City sought an exception to the State's mandate that industrial wastewater discharges not include heavy metals.*** The City did not deny that industrial discharges from its CSOs contributed to the problem of heavy metals in the Bay, but rather sought to minimize its contribution to the Bay as a whole and pleaded that the standard was impossible to meet.

- ***For years the City sought a standard of an average of eight overflow events per year instead of one.*** After the standard of one per year was imposed in the City's 1979 NPDES permit, it took the City another eight years to reach compliance.

- ***The City sought an express exception for Yosemite Creek from the Regional Board's mandate that CSOs not discharge into dead-end sloughs.*** It apparently won that exception only after persuading the State Department of Parks -- a PRP at the Site -- to support allowing continued CSO discharges into the slough.

[3] We cite here only material discussed in either the Group Memo or the City's Letter, and thus are not enclosing copies of the materials referenced. However, we're happy to provide copies of them.

- ***The City has long known that its CSO discharges into Yosemite Slough have contributed to the contamination of the sediments there, including causing anoxic sludge conditions.*** Rather than relocate the Yosemite Slough CSOs as the Regional Board mandated, the City sought to minimize its contributions by pointing to the fact that the slough has been used as a *de facto* dump for years.

- ***In addition to the CSOs discharging into the slough and the* de facto *dumping, a sanitary landfill was formerly operated at the head of the slough.*** City documents indicate that a sanitary landfill was operated at the head of the slough where the former Yosemite Avenue pumping station was later constructed.

Rather than focus on these and other "relevant facts and circumstances" specific to the CSO discharges into Yosemite Creek, as CERCLA requires, the City's letter focuses on the national problem of CSOs and its efforts to comply with the 1979 NPDES permit. The City argues that its eight year delay after 1979 was justified due to the substantial cost of compliance. That is debatable. What is *not* debatable is that the City's actions after 1979 do *not* shield it from liability for what it did -- and what it failed to do -- before 1979.

As detailed below, for decades prior to 1979, the City (1) knew that Yosemite Creek was contaminated and that its CSO discharges were a cause, (2) knew that the many industrial facilities in the Yosemite Creek Drainage Basin (the "Basin") were putting hazardous substances into its sewers, and (3) did little to prevent these problems. Indeed, for years it failed to comply with numerous State orders to remedy the problem of raw industrial sewage discharges from its CSOs. The City did not complete upgrades to its sewers in the Basin until 1987 -- "only" eight years after the NPDES permit, but some *20 years* after the Regional Water Quality Control Board for the San Francisco Bay Region (the "Regional Board") first ordered it to stop discharging raw sewage. The City's letter largely avoids discussion of these earlier periods. When the "relevant facts and circumstances" of this history are considered, it is clear that the City cannot demonstrate the due care necessary to establish CERCLA's third party defense.

### A. The Standard For the "Due Care" Defense is Site-Specific, and Requires Comprehensive Action to Prevent Foreseeable Harm.

The City contends that it meets the standard of due care because it was "ahead of the curve" as compared to other cities with combined sewer systems. However, the standard for CERCLA's third party defense is not what other cities were doing, but what the City was doing with its system *in light of all the relevant facts and circumstances*. That said, it is notable that EPA has named other cities on the West Coast with combined sewer systems as PRPs at much larger sediment sites, including Portland, Oregon (the Portland Harbor Site; *see generally* http://yosemite.epa.gov/R10/CLEANUP.NSF/sites/ptldharbor) and Seattle, Washington (the Lower Duwamish Waterway Site; *see generally* *http://yosemite.epa.gov/r10/cleanup.nsf/346a4822da38ae7088256da6005fc923/3d210ff68f58c79*

d88256dbf006096bd!OpenDocument). A 1979 City study noted these cities, and discussed an earlier study that found roughly comparable levels of heavy metals in CSO runoffs in Seattle and San Francisco's Bayside -- including those that are COCs here (lead, mercury and zinc).[4]

What is most relevant, however, is what occurred here in San Francisco. To establish the third-party defense, the City must demonstrate that it "took *all precautions with respect to the particular waste* that a similarly situated reasonable and prudent person would have taken *in light of all the relevant facts and circumstances*." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1276 (E.D.Cal. 1997) (emphasis added); *see also* 42 U.S.C. § 9607(b)(3)(a). This includes taking "those steps necessary to protect the public from a health or environmental threat." *State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2nd Cir. 1996) (quoting H.R. Rep. No. 253, 99th Cong., 2d Sess. 187 (1986)). Assertion of the third party defense imposes a heavy burden of proof on sewer system authorities, Bohannon, *Polluters and Protectors: Combined Sewer System Authorities and Urban Waterway Restorations*, 45 Nat. Resources J. 539, 557 (2005) ("*Bohannon*"); *see also Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 682-83 (4th Cir. 1995) ("*Westfarm*"); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1539-44 (E.D. Cal. 1992) ("*Lincoln Properties*"):

> Mere compliance with Clean Water Act regulations and permits does not rise to the level of due care and precaution necessary to shift CERCLA responsibility to third parties. In order to prove that pollution is 'solely' the fault of a third party, combined sewer system authorities may be required to demonstrate that they have operated under zero-discharge rules like [the sewer authorities in *Lincoln Properties*]; that they maintain their facilities in good condition so that overflows, spills, discharges, and leaks are not likely to occur, and that they respond immediately to any releases. It is likely that few sewer system authorities can satisfy these requirements.

*Bohannon,* 45 Nat. Resources J. at 557.

As *Bohannon* notes, in those cases in which combined sewer system authorities successfully established the third party defense, the authorities demonstrated essentially a "zero tolerance" approach to industrial discharges into the sewers *and* that overflows and other such discharges to the environment were not likely to occur. With respect to the former, compare *Lincoln Properties,* 823 F. Supp. at 1544 (no liability where a county ordinance prohibited discharges into the sewers of the chemicals at issue), and *Carson Harbor Village, Ltd. v. Unocal*

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[4] San Francisco Wastewater Program, The City and County of San Francisco, *Bayside Wet Weather Facilities Revised Overflow Control Study* (May 1979) ("1979 Bayside Overflow Control Study") at II-1 and Table IV-3.

*Corp.*, 287 F. Supp. 2d 1118, 1194 (C.D. Cal. 2003) ("*Carson Harbor Village*") (no liability where defendants' regulations completely banning disposal of hazardous materials into the drains), with *Westfarm*, 66 F.3d at 682 (finding sewer authority liable where its "regulations permitted discharges of certain quantities" of the hazardous substances at issue). As nearly all combined sewer systems are designed to have a certain amount of overflows in certain amounts of wet weather, very few can meet the system integrity aspect of the standard.

Even if one concludes that CERCLA requires something less than the "zero tolerance" standard that *Bohannon*'s review of the cases revealed, it certainly is the case that prior to 1987 the facts relating to San Francisco's sewer system were far closer to the end of the "due care" spectrum occupied by *Westfarm* and *City of Bangor v. Citizens Communications Company*, 2004 U.S. Dist. LEXIS 3845 (D.Me.) ("*City of Bangor*"), discussed *infra*, than to the end of the spectrum represented by *Lincoln Properties* and *Carson Harbor Village*. This is apparent when one considers the two critical factors -- the design of San Francisco's sewer system and the regulation of industrial discharges to it -- during the relevant periods.

### B. Discharges of the COCs from CSOs into Yosemite Creek were not Only Foreseeable but were Known, and Yet for Decades the City Failed to Take Reasonable Precautions.

The City's presentation of the facts implies that the risk of harm from CSOs was not foreseeable until between 1977 and 1994, a period marked by EPA's report on CSOs and subsequent federal policy documents regarding CSOs. City Letter at 4-5. Further, the City suggests that its responsibilities for addressing the problem of its wet weather discharges to the Bay were first triggered by the issuance of its NPDES permit in 1979. *Id.* at 10. By limiting its focus to the period of 1979 onward, the City ignores the factual record showing that long before that time it was on notice of the likelihood of contamination in the Bay from the City's sewer system. There are roughly four distinct periods. (The discussion below supplements the Group Memo with information in the City documents produced in December.)

#### 1. WWII to 1957.

This period was marked by heavy industrial development in the Basin. During the early part of this period of industrial development, the Basin was served by a sewer system that had been constructed in the early 1900's, and which dumped 100% of the combined raw sewage into the Bay. The City encouraged and facilitated this industrial development by filling-in significant portions of both Yosemite Creek and South Basin. The City did this despite the fact that during this period there also was a growing awareness of the negative environmental consequences of raw sewage discharges to surface waters. This is reflected by the passage of the California Dickey Water Pollution Act in 1949, and the Regional Board's establishment of requirements for sewer system discharges to the Bay in 1951.

And indeed, City documents indicate that both the problem of industrial discharges of hazardous substances to its sewer system and the design problem of its CSOs discharging raw sewage to surface waters were recognized during this period. With respect to the former, common sense suggests that the risk of discharges of hazardous materials to the sewers was high given the prevailing industrial land use in the Basin, including multiple drum reconditioning facilities. And the City indeed later acknowledged that, "The need for an effective Industrial Waste Program in San Francisco became obvious by the 1950's,"[5] and that the Regional Board had expressed concerns about the wet weather flows from its CSOs in the late 1950's.[6]

**2. 1957 to 1967.**

After the industrial development of the Basin during and following World War II, the City first undertook improvements to the sewer system there in 1957. That upgrade sought to implement the City's 1935 Master Wastewater Plan, which recommended diversion to treatment plants of all dry weather flows and diversion to surface waters of wet weather flows whenever precipitation exceeded 0.02 inches per hour.[7] This is a rate defined by the City as "a heavy drizzle," and occurred an average of 82 times per year.[8]

While the City had been aware for some time of the problem of industrial discharges of hazardous substances to its sewers, during this period, as the City later acknowledged, it did not adequately enforce its regulations to prevent discharges to the sewers: "While penalties for violations were provided, in practice they were never adequately enforced and treatment processes were often adversely affected. . . . [In addition,] 'slug' discharges of industrial based chemicals severely affected the treatment processes."[9] Similarly, while the City and the Regional Board had been concerned about the wet weather flows discharging raw sewage to the Bay for some time, it was not until 1964 that the City first allocated bond monies to study the issue. City Letter at 7. Two years later in 1966 the City's Board of Supervisors adopted a policy that it develop a means of controlling and treating its wet weather flows. *Id.* These slow, tentative steps to address the problem did not satisfy the Regional Board, and in 1967 the Regional Board issued the first of many orders to the City regarding its wet weather flows. *See id.; see also* Group Memo at 5.

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[5] S. Myron Tatarian, Robert C. Levy, *Annual Report, San Francisco Industrial Waste Program for Calendar Year 1973* ("1973 IWP Annual Report") at II-12.
[6] City and County of San Francisco, Department of Public Works, *Overview Facilities Plan, San Francisco Master Plan Wastewater Management*, assisted by J.B. Gilbert & Associates, (Aug 1975) ("1975 Facilities Plan Overview") at 10.
[7] *Id.* at 9-10.
[8] 1979 Bayside Overflow Control Study at II-1.
[9] 1973 IWP Annual Report at II-12.

### 3. 1967 to 1979.

This is the key period during which the Regional Board issued cease and desist orders and resolutions to compel the City to improve the sewer system, and the City missed deadline after deadline as it resisted the Regional Board's efforts. *See* Group Memo at 5-6 and Exhibits A, C, D, and E. The Regional Board efforts persisted during this period as awareness of the problems grew and grew.

#### a. Industrial Inputs to the Sewer System.

With respect to the problem of industrial discharges to the sewer system, progress was slow. Though the problem was known, the first study of the properties of San Francisco's CSO overflows was not conducted until 1967, but it tested only for sanitary sewer variables (*e.g.*, total suspended solids, total and fecal coliforms); it did not sample for heavy metals or chlorinated compounds.[10] In 1972, the State adopted a Water Quality Control Plan for Discharge into the Ocean Waters of California ("the 1972 Ocean Plan"), which the City characterized as "of major significance in the control of discharged heavy metals which are most often directly attributable to industrial activity.[11] The 1972 Ocean Plan set strict limits for heavy metals and chlorinated hydrocarbons in the City's effluent discharge for which "no variances is permitted"; the next year, 1973, the City acknowledged that these requirements "necessitate strong source control procedures and vigorous enforcement activities against dischargers."[12] That same year the City developed its first Industrial Waste Program ("IWP") to monitor industrial discharges into sewers[13]; all nine of the COCs at the Yosemite Creek Site are included in the Waste Discharge Report form that the City required industrial facilities to complete as part of the IWP.[14]

The City recognized that this need to address industrial discharges to its sewer system was most acute in the Southeast portion of the City that includes the Yosemite Basin:

> The presence of certain heavy metals in plant influent require processes which involve additional expensive steps to achieve acceptable effluent standards. Studies indicate that industrial based contributions to the Southeast Plant's influent are responsible for a substantial portion of the lead and mercury present.[15]

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[10] 1979 Bayside Overflow Control Study at IV-2.
[11] 1973 IWP Annual Report at II-10.
[12] *Id.* at II-10 to II-11 and Plate II-2.
[13] 1975 Facilities Plan at 60.
[14] Waste Discharge Report form attached to 1973 IWP Annual Report at II-10.
[15] *Id.* at II-13.

Industrial waste flows constituted 15% of total dry weather flows for the Southeast Treatment Plant -- three times that of the Richmond-Sunset Plant -- with quality that was "much poorer than the quality of sanitary waste."[16] This was detailed in a study that revealed the presence of all of the heavy metal COCs in the City's sewer flows, with the highest concentrations in those to the Southeast Treatment Plant.[17] Two years later, the City concluded that it was "unlikely" that it would meet the 1972 Ocean Plan's constituent limits on effluent quality."[18]

While the City was pleading that it could not meet the State's requirements, it was accumulating data regarding the general toxicity of its CSO overflows that indicated problems associated with industrial discharges to its sewer system.[19] The 1979 study reported exceptionally high chromium in the Southeast zone as compared with data from CSO studies in Sacramento and Seattle: "A notable exception is the high chromium level which, we believe, is the result of industrial discharges in the Southeast zone . . . Data from this storm has been forwarded to the City's Industrial Waste Division in order to determine the sources and take corrective action."[20] While the City finally began undertaking some source control efforts in 1973 with the development of its IWP, it was and remains a far cry from "zero tolerance."

**b. Management of Wet Weather Flows and CSO Overflows.**

The State's 1972 Ocean Plan also prohibited the bypassing of untreated wastes, a central aspect of the City's combined sewer system.[21] In the face of this requirement, two years later the City adopted a new Wastewater Master Plan (still in place today) that recommended that the City limit wet-weather overflows to a frequency of eight per year. In 1975, the City contended that it could meet the Ocean Plan's requirement only "if 'treatment' were defined in very loose terms," and outlined a legal argument that might enable it to do so.[22]

Also in 1975, the Regional Board adopted its Basin Plan, the relevant requirements of which were later implemented in Regional Board orders issued to the City, that

- recommended that CSO overflows be reduced to 0.2 to eight per year;
- required that all discharges to the Bay achieve a dilution ration of 10:1 (receiving water to effluent); and

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[16] 1975 Facilities Plan at 61.
[17] 1973 IWP Annual Report at Plate III-5.
[18] 1975 Facilities Plan at 85.
[19] *See* 1979 Bayside Overflow Control Study at IV-1 to IV-5 and Tables IV-1 and IV-2 (detailing effluent data for toxic substances at the three treatment plants between 1975 and 1979). Note that this Study contains effluent sampling data for all nine of the COCs at the Yosemite Creek Site.
[20] *Id.* at IV-3, IV-10.
[21] 1975 Facilities Plan at 85.
[22] *Id.*

- required that CSOs be removed from dead-end sloughs such as Yosemite Creek.[23]

In 1979, the City responded to these requirements by recommending the upper end of the average number of overflow events to be allowed each year -- eight -- and specifically requested variances with respect to both the dilution ratio and the ban on CSO discharges to dead-end sloughs.[24] With regard to this last request for a variance, the City contended that costs of relocating the CSOs at Channel and Islais Creek outweighed the benefits. However,

> Costs may not be out of proportion to the benefits at Yosemite, as the costs for relocation would be much lower and this area is part of the Candlestick Point State Recreation Area. However, relocation of the Yosemite structure will require approval of the State department of Parks and Recreation.[25]

The City sought this variance for Yosemite Creek even as it reported on the poor conditions present there. Indeed, it contended that things were so bad that the amount attributable to the overflows was impossible to determine:

> Anoxic surface conditions have also been reported for the inter-tidal mud-flats at Yosemite/South Basin (Sutton 1978). However, such anoxic conditions are frequently encountered in mud-flats and salt marshes that are free of gross pollution. In addition, this area has been extensively used as a dump; some areas being completely covered with solid wastes. It is not possible to disaggregate the relative significance of natural effects, dumping and overflows in the formation of the anoxic surface conditions; nor would it be possible to predict the changes, if any, that would result from a reduction in the number of overflows.[26]

Of course, these well-known conditions persist to this day.

**4. 1979 to 1987.**

The Regional Board was not moved. On June 19, 1979, it issued to the City Regional Board Order No. 79-67, the NPDES permit for the Southeast Sewerage Zone and its Wet Weather Diversion Structures (the "1979 NPDES Permit"). The 1979 NPDES Permit set the

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[23] 1979 Bayside Overflow Control Study at 2, 4 and II-2; *see also* Regional Board Order No. 79-67 (June 19, 1979) (the "1979 NPDES Permit") at 2.
[24] *See id.*
[25] *Id.* at XI-5.
[26] *Id.* at VI-7 to VI-8.

allowable annual average number of CSO overflows for diversion structures 36-43 (which include the Yosemite Creek CSOs) at one per year instead of the eight requested by the City; the Board specifically ordered the City to "design and construct facilities for diversion structures to achieve a long term average of 1 overflow per year.".[27] It also prohibited discharges that do not "receive a minimum initial dilution of at least 10:1," and perhaps of greatest relevance here, it prohibited the "[d]ischarge of waste into dead-end sloughs or similar confined water areas."[28]

In 1983, four years later, the City produced its Environmental Impact Report for the Yosemite Transport Storage Facility, noting that planning for the improvements had begun in 1979.[29] The 1983 Yosemite EIR reiterated some of the themes of the City's 1979 study on Yosemite Creek, though it attributed more of the problem to the CSO overflows: it described Yosemite Channel as "currently visually unappealing due to the frequent discharge of combined sewer and stormwater flows at overflow points along the channel."[30] It also noted that before the former Yosemite Pump Station/Reservoir was constructed, the site, which is located at the head of Yosemite Slough, "was used as a sanitary landfill in the past."[31]

Eight years after the 1979 NPDES permit was issued, the City finally completed the improvements to its Yosemite Creek CSOs. Of course, the improvements did not relocate the CSO away from the dead-end slough, as the 1979 NPDES Permit required. Apparently, and despite the fact that the City's own cost/benefit analysis in 1979 had indicated that it was feasible, the City ultimately prevailed on its request for a variance. It could only have done so with the acquiescence of the California Department of Parks and Recreation, as the City's 1979 study noted that "[c]lose coordination with the State Department of Parks and Recreation will be required to develop a mutually acceptable system."[32]

The City contends that its delay in upgrading the sewer system was justified due to the substantial costs involved. City Letter at 16. Even if the City was justified in taking eight years to construct the necessary improvements to comply with the 1979 NPDES permit, actions taken after 1979 do not insulate it from CERCLA liability for failing to exercise due care in prior years. *See Westfarm*, 66 F.3d at 682 (rejecting argument that the fact that the Clean Water Act permits certain levels of hazardous materials to be discharged into the sewer systems protects the sewer authority from CERCLA liability); *City of Bangor*, 2004 U.S. Dist. LEXIS at *49.

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[27] 1979 NPDES Permit at 6.
[28] *Id.* at 7.
[29] Final Environmental Impact Report, Yosemite Transport Storage Facilities, City and County of San Francisco Department of City Planning (July 1, 1983) (the "Yosemite EIR") at 17. The Yosemite EIR states the annual average number of CSO overflow events was 46 at that time, *id.* at 21; the median quantity of discharges from the three Yosemite CSOs was 430 million gallons per year, though the EIR noted the effects of stormwater overflows were not evenly distributed along the shoreline. *Id.* at 36.
[30] *Id.* at 55.
[31] *Id.* at 54.
[32] 1979 Bayside Overflow Control Study at VII-4.

As discussed above, when one examines the history of industrial discharges to the City's sewer system and the system's design for wet weather flows that resulted in discharges to the Bay of large volumes of raw sewage whenever there was so much as a heavy drizzle, the present problems were clearly foreseeable long before the issuance of the 1979 NPDES permit. The City had the power to abate these foreseeable releases of COCs into its sewers, but never prohibited discharges of them and failed to enforce the lax regulations that were in place. *See* Group Memo at 8. Nothing in the record even indicates that the City even cautioned or provided notice to dischargers to allow for voluntary actions to limit discharges during rain events. This is a far cry from the "zero tolerance" standard discussed in *Bohannon*. Similarly, the problems associated with the CSO overflows had been recognized for decades -- and had been the subject of Regional Board orders since 1967 and expressly prohibited by the State's 1972 Ocean Plan. In view of this history, the City offers no compelling justification for its decades of inaction and delay in addressing the known problem of discharges of the COCs from its sewers into Yosemite Creek.

**C. The Bay Area Drum Site Is A Red Herring.**

The City incorrectly assumes that the Bay Area Drum site is the source of the contamination of Yosemite Slough, and focuses much of its foreseeability argument on that one site. *See* City Letter at 16. In fact, Bay Area Drum was one of dozens, if not hundreds, of industrial dischargers in the Yosemite Basin. By the mid-1950s the area around Yosemite Creek was heavily industrialized, including several other drum reconditioners, and the Navy had been operating Hunters Point for over 15 years. Doubtless many of these facilities discharged the COCs into the sewers. This is confirmed by the City's inspections of other industrial facilities in the Basin, some of which were the subject of environmental enforcement actions. *See* Group Memo at 9 and Exhibits M and N. Whether the City exercised due care in its design and maintenance of the sewers, and in regulating what went into the sewers, is not limited the Bay Area Drum site, but includes the system that services the industrialized Yosemite Basin.

**D. The Facts Here Are Not Distinguishable From Those Cases In Which Public Sewer Systems Were Found Liable.**

The City's effort to distinguish *Westfarm* and *City of Bangor* is unpersuasive. *Westfarm* is the leading case on municipality liability under CERCLA for sewer operators. *City of Bangor*, 2004 U.S. Dist. LEXIS at *45. In *Westfarm*, the court rejected the argument of the sewer operator ("WSSC") that it had exercised due care. WSSC had known from its inspections of the sewer system and industrial dischargers' practices that these facilities were putting hazardous substances into the sewers and that leakages were occurring; yet WSSC failed to remedy the problem when it had the authority to do so. *Westfarm*, 66 F.3d at 683. WSSC's regulations also "permitted discharges of certain quantities" of the hazardous substances at issue. *Id.* at 682.

The conditions here are materially the same as in *Westfarm*. As early as the 1960's and 1970's, SFPUC was actively inspecting industrial facilities in the Basin and knew that heavy

metals and chlorinated compounds were being discharged into its sewers from industrial facilities. Additionally, the Regional Board was pressuring the City to address violations of water quality laws from its sewer operations. Years went by after the City became aware of the problem before it developed an Industrial Waste Program that is a far cry from "zero tolerance," and many more years went by before it reconfigured the sewers in the Yosemite Basin. Meanwhile, and to this day, SFPUC's regulations continued to permit discharges of certain quantities of the COCs. As in *Westfarm*, SFPUC "had the power to abate the foreseeable releases . . . yet failed to exercise that power." *Id.* at 683. Indeed, it not only had the power to act, it had been repeatedly ordered to do so.

The City's attempt to distinguish *City of Bangor* is also unpersuasive. In that case, the court found the third party defense did not apply because the City of Bangor had a direct role in knowingly building a sewer line that transported raw hazardous waste to a river for disposal. *City of Bangor*, 2004 U.S. Dist. LEXIS at *11. Here, the City had the direct role in building a sewer system that served dozens if not hundreds of industrial facilities in the Yosemite Basin, and it designed that system to transport raw sewage to the slough in even mildly wet weather. The sewer system at issue in *City of Bangor* had been constructed in the 1800's when there was far less awareness of the environmental consequences of industrial discharges. In the Yosemite Basin, on the other hand, the system was constructed in the late 1950's and early 1960's -- *after* the area had been industrialized, and *after* awareness of the problems associated with discharges of raw industrial sewage to surface waters had begun to become well known. Thus, the City's "direct arrangement of and contribution toward hazardous waste disposal . . . effectively prevents the City from seeking refuge in the third-party defense." *Id.* at *50.

**E. Conclusion.**

The City is clearly a PRP at the Yosemite Creek site. The record discussed above and in the prior Group Memo also clearly indicate that the City cannot establish the third party defense. The City's letter does not meet its substantial burden of proof to establish that it exercised due care and took precautions against foreseeable acts or omissions of third parties. It is time for the City to take responsibility for its large role in the contamination of the sediments in Yosemite Slough, just as the cities Portland, Tacoma, and Seattle have with respect to their sediment sites.

Sincerely,

Nicholas W. van Aelstyn

Nicholas W. van Aelstyn

cc: Elaine M. O'Neil, Esq. (*via e-mail*)